No. 85-539

Supreme Court, U.S.
FILED
SEP 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL LANE, Director, Illinois Department of Corrections, and **NEIL F. HARTIGAN**, Attorney General, State of Illinois,

Petitioners,

vs.

UNITED STATES OF AMERICA ex rel. **JIMMIE ENOCH, MELVIN ENOCH** and **ROBERT ENOCH,**

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
MARK L. ROTERT *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

Counsel for Petitioners

JOAN G. FICKINGER
Assistant Attorney General
Of Counsel

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 32976—50—9-23-85)

491

QUESTION PRESENTED FOR REVIEW

Whether the state trial court's imposition of a statutory preclusion sanction against respondents comported with the Sixth Amendment, where respondents failed to adhere to discovery rules requiring pre-trial disclosure of witnesses.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING CERTIORARI:	
THE STATE TRIAL COURT'S IMPOSITION OF THE PRECLUSION SANCTION AGAINST RESPONDENTS COMPORTED WITH THE SIXTH AMENDMENT, IN LIGHT OF RESPONDENTS' FAILURE TO ADHERE TO DISCOVERY RULES REQUIRING PRE-TRIAL DISCLOSURE OF WITNESSES	7
CONCLUSION	13

APPENDIX

A—Opinion of the United States Court of Appeals for the Seventh Circuit, dated July 18, 1985 .	A-1
B—Opinion of the United States District Court for the Northern District of Illinois, dated February 23, 1984	B-1
C—Order of the Appellate Court of Illinois for the First Judicial District, dated March 31, 1982 .	C-1

TABLE OF AUTHORITIES

CASES:	PAGE(S)
Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982) ..	8
Chambers v. Mississippi, 410 U.S. 284 (1973) ...	8
Fendler v. Goldsmith, 728 F.2d 1181 (9th Cir. 1984)	8
Illinois v. Allen, 397 U.S. 337 (1970)	9
Ronson v. Commissioner of Cor. of State of N.Y., 604 F.2d 176 (2d Cir. 1979)	7
Smith v. Jago, 740 F.2d 969, *cert. denied*, 53 U.S.L.W. 3667 (U.S. March 18, 1985)	12
United States v. Barron, 575 F.2d 752 (9th Cir. 1978)	8
United States v. Davis, 639 F.2d 239 (5th Cir. 1981)	7
United States ex rel. Enoch v. Hartigan, 768 F.2d 161 (7th Cir. 1985)	1, 6, 7, 11
United States v. Fitts, 576 F.2d 837 (10th Cir. 1978)	8
United States v. Nobles, 422 U.S. 225 (1975) ..	10
United States v. White, 583 F.2d 899 (6th Cir. 1978)	8
Wardius v. Oregon, 412 U.S. 470 (1973)	7, 10
Williams v. Florida, 399 U.S. 78 (1970)	7, 8, 9

STATUTES: PAGE(S)

Fed. R. Crim. P. 12.1 9

Fed. R. Crim. P. 30 9

Fed. R. Crim. P. 33 9

Ill. Rev. Stat. ch. 110A, § 413(d)(i) (1983) 2, 8

Ill. Rev. Stat. ch. 110A, § 415(g)(i) (1983) 3, 8

ARTICLE:

Note, *Alibi Notice Rules: The Preclusion Sanction as Procedural Default*, 51 U. Chi. L. Rev. 254 (1984) 12

In The

Supreme Court of the United States

October Term, 1985

MICHAEL LANE, Director, Illinois Department of Corrections, and **NEIL F. HARTIGAN**, Attorney General, State of Illinois,

Petitioners,

vs.

UNITED STATES OF AMERICA ex rel. **JIMMIE ENOCH, MELVIN ENOCH** and **ROBERT ENOCH,**

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *United States ex rel. Enoch v. Hartigan*, 768 F.2d 161 (7th Cir. 1985). A copy of the opinion is attached to this petition as Appendix A. The opinion of the United States District Court for the Northern District of Illinois is reported at *United States ex rel. Enoch v. Lane*, 581 F. Supp. 423 (N.D. Ill. 1984).

A copy of the opinion is attached to this petition as Appendix B. The order of the Appellate Court of Illinois is unpublished pursuant to Illinois Supreme Court Rule 23. A copy of the order is attached to this petition as Appendix C.

JURISDICTION

The court of appeals on July 18, 1985 affirmed the district court's grant of respondents' application for a writ of habeas corpus. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

***Ill. Rev. Stat.* ch. 110A, § 413(d)(i) (1983)**

Supreme Court Rule 413. Disclosure to Prosecution.

(d) Defenses. Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:

(i) The names and last known addresses of persons he intends to call as witnesses together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, any record of prior criminal convictions known to him;

Ill. Rev. Stat. ch. 110A, § 415(g)(i) (1983)

Supreme Court Rule 415. Regulation of Discovery.

(g) Sanctions.

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances.

STATEMENT OF THE CASE

A. State Court Proceedings.

Respondents Jimmie, Melvin and Robert Enoch were found guilty of rape and aggravated kidnapping by a jury in the Circuit Court of Cook County, Illinois in June, 1980.

Sandra Davis, the eighteen-year-old victim of the crime, testified at trial that on the evening of December 5, 1975, she played cards with a group of people at her cousin's house from the early evening until approximately 4:00 in the morning. (R. 52) When the game ended, Sandra took public transportation to a stop near her home, then proceeded from there on foot. (R. 53) Walking through Chinatown, Ms. Davis happened upon Robert and Melvin Enoch, whom she had known for several years. (R. 54, 74)

Robert Enoch asked Sandra Davis whether she thought she was "too good to socialize with them," (R. 56) then dragged her to the Enoch apartment where she was raped and beaten by Melvin, Robert and Jimmie Enoch. (R. 60-69)

After the State had rested and three defense witnesses testified, defense attorneys moved to amend their answer to the State's discovery request regarding the designation of witnesses. The defense claimed it had just learned of the existence of one Patricia Griffin, who could testify to an alleged altercation between Sandra Davis and an unidentified man on the morning of December 6. (R. 225)

In their offer of proof, defense attorneys said Ms. Griffin would testify that she saw Sandra Davis on the street arguing with a man, and that the man said "something to the effect" of "bitch, where is the money." (R. 227)

Ms. Griffin lived in the apartment next to the Enochs' and served as the "captain" of the floor on which she and the Enochs lived. (R. 226) The Enoch brothers lived together with their mother and other family members in the apartment where the rape and beating took place. According to the defense, Ms. Griffin had told the Enochs' mother about the alleged altercation several months before trial. (R. 228) Although defense attorneys had interviewed Mrs. Enoch, and although Mrs. Enoch had already testified at trial, the defense claimed that Mrs. Enoch had never previously mentioned her conversation with Patricia Griffin. (R. 228)

Noting that defendants had demanded trial, that the case had been on the trial call every day for more than two months, and that the trial was in its third day, the prosecution objected to the amendment motion. (R. 230)

The court denied defendants' motion to amend, observing:

> It would violate every contention of any notice of discovery to permit it . . . It is more than a question of prejudice. It is more than a question of how one side or the other is going to be hurt. It is a ques-

> tion of possible design, possibly I say, after the State had rested, and the defense has commenced . . . I imagine that this very situation is one of the strongest reasons why discovery rules were eventually adopted . . .

(R. 230-232)

The defense then resumed its case. Defense witnesses testified that on the night and morning in question, Sandra Davis attended a party with a group of people including Robert, Jimmie and Melvin Enoch. (R. 244) Witnesses testified that Ms. Davis left the party somewhere between 5 and 6 o'clock in the morning. (R. 325)

Teresa Mosely, who had previously been convicted for theft, (R. 279) testified that she had engaged in prostitution "a couple of months ago," and that she and Sandra Davis "use (sic) to have sex with mens (sic) for money." (R. 263, 280)

Other defense witnesses included such interested parties as respondents' mother, brother, Jimmie Enoch's wife, and a woman who used to live with respondents' brother. With the exception of the latter, all of the defense witnesses visited at least one of the respondents in jail prior to trial. (R. 249-251, 274) Ms. Mosely admitted visiting the jailhouse, but denied that she actually spoke with respondents. (R. 274) Ms. Mosely never reported her version of the sequence of events to the police, although she knew respondents would be tried for rape. (R. 278)

From a judgment of conviction, respondents appealed to the Illinois Appellate Court for the First District. The appellate court affirmed the conviction. *People v. Jimmie Enoch, Melvin Enoch and Robert Enoch*, Nos. 80-2100, 80-2101, 80-2102 (1st Dist. Mar. 31, 1982).

The appellate court reasoned that since Teresa Mosely's testimony implied that Sandra Davis was a prostitute, Ms. Griffin's testimony would have been cumulative. Although exclusion is a drastic sanction, the court concluded, no prejudice was demonstrated. *Id.* at pp. 3-4.

The Illinois Supreme Court denied leave to appeal.

B. Federal Court Proceedings.

Upon exhausting state remedies, respondents filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. The District Court granted the habeas petition. *See United States ex rel. Enoch v. Lane*, 581 F. Supp. 423 (N.D. Ill. 1984).

The court held that respondents' due process and fair trial rights were violated by imposition of the preclusion sanction for two principal reasons. First, respondents were not responsible for their attorneys' failure to list Griffin as a witness. Secondly, Ms. Griffin's testimony was important to the defense. 581 F. Supp. at 431. The court concluded the error was not harmless beyond a reasonable doubt and granted the writ.

The case was then submitted to the United States Court of Appeals for the Seventh Circuit for review of the question whether constitutional considerations compelled the trial court to permit Patricia Griffin to testify.

Weighing the State's interest in enforcing its discovery rules against respondents' Sixth Amendment rights, the court found the state's interest insufficient to override the Sixth Amendment considerations at issue. *United States ex rel. Enoch v. Hartigan*, 768 F.2d 161, 163 (7th Cir. 1985). Discovery rules were devised to prevent surprise to the state, the court said, and not to punish the accused

for "mere technical errors or omissions." 768 F.2d at 163. Furthermore, the court held, the defense was prejudiced by the sanction, while less severe sanctions were available. *Id.*

Accordingly, the Court of Appeals affirmed the decision of the federal district court to issue the habeas writ.

REASONS FOR GRANTING CERTIORARI

THE STATE TRIAL COURT'S IMPOSITION OF THE PRECLUSION SANCTION AGAINST RESPONDENTS COMPORTED WITH THE SIXTH AMENDMENT, IN LIGHT OF RESPONDENTS' FAILURE TO ADHERE TO DISCOVERY RULES REQUIRING PRE-TRIAL DISCLOSURE OF WITNESSES.

In *Williams v. Florida*, 399 U.S. 78, 84 n.4 (1970) and *Wardius v. Oregon*, 412 U.S. 470, 473 n.4 (1973), this Court specifically left unanswered the question whether a state can enforce its discovery rules against a defendant by excluding relevant evidence. The instant case exemplifies the unjustified trend in the federal courts to delimit state courts' authority to enforce reasonable discovery rules through imposition of the preclusion sanction.

State courts' consequent uncertainty in applying the sanction is increased by the inconsistent treatment given the issue in the circuits: *Ronson v. Commissioner of Cor. of State of N.Y.*, 604 F.2d 176 (2d Cir. 1979) (good faith/prejudice test); *United States v. Davis*, 639 F.2d 239, 243 (5th Cir. 1981) (preclusion sanction *per se* impermissible); *United States ex rel. Enoch v. Hartigan*, 768 F.2d 161, 163 (7th Cir. 1985) (balancing State's interest in enforcing discovery rule against defendant's Sixth Amendment

interests); *Fendler v. Goldsmith*, 728 F.2d 1181, 1190 (9th Cir. 1984) (harmless error test).[1] Petitioner therefore asks that this Court affirm Illinois' right to effectuate its general criminal discovery rules through use of the sanction by reversing the judgment of the Seventh Circuit.

Illinois discovery rules provide that a defendant must apprise the state of any defense he intends to make, and must furnish the State with the names and addresses of persons he intends to call as witnesses. *Ill. Rev. Stat.*, ch. 110A, § 413(d)(i) (1983). A defendant's failure to comply with this discovery rule may result in imposition of the preclusion sanction. *See Ill. Rev. Stat.*, ch. 110A, § 415(g)(i) (1983). Petitioners submit that imposition of this sanction in the instant case conformed with the Sixth Amendment.

While this Court announced state court defendants' Sixth Amendment right to present witnesses in their own behalf in *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), that rule has not been held to be so inviolate that a state cannot condition that right on compliance with reasonable procedural rules such as that of Illinois'.

In *Williams v. Florida*, 399 U.S. 78, 86 (1970), for example, this Court upheld a Florida notice-of-alibi rule against a Fifth and Sixth Amendment challenge. The Florida rule provided that if a defendant failed to give the prosecution pre-trial notice of intention to claim an alibi, exclusion of the alibi evidence might result. 399 U.S. at 79-80. Although the *Williams*' defendant's compliance

---

[1] See also cases considering preclusion sanction issue in context of alibi witness notice rules: *United States v. White*, 583 F.2d 899 (6th Cir. 1978) (preclusion permitted); *Alicea v. Gagnon*, 675 F.2d 913 (7th Cir. 1982) (preclusion improper); *United States v. Barron*, 575 F.2d 752 (9th Cir. 1978) (preclusion permitted); *United States v. Fitts*, 576 F.2d 837 (10th Cir. 1978) (preclusion permitted).

with the alibi notice rule precluded review of the exclusion, this Court found "ample room" in the constitution for such a rule, commenting:

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.

399 U.S. at 82.

Hence, while *Williams* endorses the concept of pre-trial notice rules, it does not decide the case at bar because this Court was not squarely presented with the issue, and, moreover, this Court has suggested that a different balance of interests might be required where an alibi defense is not involved. 399 U.S. at 84 n.4 (1970).

Nonetheless, Congress and this Court have seen the need to place reasonable conditions on assertions of Fifth and Sixth Amendment trial rights in other contexts. For example, Federal Rule of Criminal Procedure 12.1 provides that if a party fails to give notice he intends to present an alibi defense, the court may exclude the testimony of undisclosed witnesses. Fed. R. Crim. P. 12.1.

Pursuant to Federal Rule of Criminal Procedure 33, a defendant may lose the opportunity to present new evidence at trial if he cannot show he exercised due diligence in procuring that evidence. Fed. R. Crim. P. 33.

A defendant who fails to posit a contemporaneous objection to improper jury instructions or to inadmissible evidence forfeits the right to object later. Fed. R. Crim. P. 30.

Additionally, this Court has held that the Confrontation Clause does not bar sequestration as a sanction against an unruly defendant. *Illinois v. Allen*, 397 U.S. 337, 347 (1970).

Finally, this Court held in *United States v. Nobles*, 422 U.S. 225, 241 (1975) that a trial court acted properly in refusing to permit defense witnesses to testify regarding interviews they held with defendant's investigator, where defendant refused to reveal to the prosecution the full scope of the investigator's interview with those witnesses. This Court observed in *Nobles*: "[O]ne cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." 422 U.S. at 241.

In sum, while courts have recognized defendants' right to present a defense, courts have also, in select circumstances, conditioned an unabridged defense on compliance with reasonable rules so as not to undercut the integrity and efficiency of the judicial system. This Court, in fact, has expressly applauded the "salutary development" of discovery devices which enhance the fairness of the adversary system. *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

The fairness of exclusion of witnesses because of non-compliance with the notification rule is exemplified in this case where alternative measures would have been highly impractical and prejudicial to the State, and where the grounds for non-compliance are suspect.

As an alternative to the preclusion sanction, the federal district court below offered the incredible advice to the State that one prosecuting attorney could have interviewed Ms. Griffin while the other continued to prosecute the case. 581 F. Supp. at 428. Surely the state prosecutors would have been duty-bound to exhibit more zealotry than this. The prosecution would undoubtedly have needed a break in the trial to interview and investigate the background of Ms. Griffin, Mrs. Enoch, Sandra Davis, the alleged pimp, and any vice squad officers. The prosecution might additionally have needed to prepare its own rebuttal witnesses. Thus, while the federal district court

scrupulously honored respondents' Sixth Amendment right to present a defense, it gave rather short shrift to the state's interest in enforcing well-founded discovery rules.

Furthermore, respondents' revelation of a "key" witness after the prosecution rested only represented an added threat to the integrity of the trial. While the trial court considered the defense attorneys' offer of proof and rejected it, suspecting a bad faith attempt to manipulate the presentation of evidence, the federal courts took Ms. Griffin's wholly untested claim[2] that Ms. Davis was involved in an unspecified argument about money and embarked on a flight of fancy about prostitution and pimps. This conclusion was completely unsupported by any evidence, including that given by the Enoch brothers, with the exception of the testimony given by Teresa Mosely, a former prostitute and felon. The Seventh Circuit found:

> [T]he jury could infer the following story from [Ms. Griffin's] testimony alone: that Davis was a prostitute, that she was working that night, that the Enochs (or others) failed to pay for her services and that this caused the physical confrontation with a pimp the following morning which resulted in bruises to Davis' body.

768 F.2d at 163.

In drawing this scenario, the Seventh Circuit offered no plausible reasons why Sandra Davis would bother to accuse anyone if she was fearful of accusing her true alleged assailant; why Sandra Davis would accuse not one, not two, but three Enoch brothers if there was no truth

---

[2] The federal district court did not hold an evidentiary hearing, noting that respondent had not asked for one, and concluding that a hearing was unnecessary. *United States ex rel. Enoch v. Lane*, 581 F. Supp. 423, 432 (N.D. Ill. 1984).

to her assertion; or why respondents did not testify about Ms. Davis' alleged prostitution based on their two-year knowledge of her. Further, the Seventh Circuit failed to question the grounds for delay in discovering and disclosing the witness.

Petitioners ask this Court to support Illinois' objective of preserving an orderly and fair criminal justice system by affirming the trial court's imposition of the preclusion sanction for failure to comply with discovery rules in timely fashion. Petitioners seek not to restrict defendants' Sixth Amendment right to present a defense, but rather, seek to ensure the integrity of evidence admitted at trial. *See generally* Note, *Alibi Notice Rules: The Preclusion Sanction as Procedural Default*, 51 U. Chi. L. Rev. 254 (1984).

The language in the Seventh Circuit and district court decisions below makes plain that the so-called balancing test adopted by that circuit is wholly inconsiderate of the state's interest. Petitioners submit that this Court should adopt a true balancing test whereby a defendant can circumvent the state's requirement for advance notice of witnesses only where the defendant can provide compelling grounds for delay in notification and the testimony of the witness is likely to be pivotal to the verdict. As Justices Burger, Brennan and White observed in their dissent from the denial of certiorari in *Smith v. Jago*, 740 F.2d 969, *cert. denied*, 53 U.S.L.W. 3667 (U.S. March 18, 1985) (No. 84-5548), a case comparable to the instant one, this is an issue "which will surely not disappear of its own accord."

If the Seventh Circuit's decision is permitted to stand, defendants will be encouraged to sandbag their defense by saving "critical" witnesses for presentation at the most opportune point in the trial. Defendants will need do little more than characterize their witness as important, and

courts will be forced to let them testify. As this case illustrates, courts will be forced into this position regardless of their first-hand assessment of the defense's good faith in making its eleventh-hour demand.

In sum, petitioners ask this Court to hold that imposition of the preclusion sanction in this case was not constitutional error, but rather, was an appropriate remedy in light of respondents' failure to comply with a reasonable discovery rule.

CONCLUSION

For the reasons set forth, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA JONES STEWART
Solicitor General, State of Illinois

MARK L. ROTERT *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

Counsel for Petitioners

JOAN G. FICKINGER
Assistant Attorney General
Of Counsel

* Counsel of Record

APPENDIX A

UNITED STATES of America, ex rel. Jimmie ENOCH, Melvin Enoch, and Robert Enoch, Petitioners-Appellees,

v.

Neil F. HARTIGAN, Attorney General of the State of Illinois, Respondent-Appellant.

No. 84-1366.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 17, 1984.

Decided July 18, 1985.

Before BAUER, Circuit Judge, POSNER, Circuit Judge, and CAMPBELL, Senior District Judge.*

WILLIAM J. CAMPBELL, Senior District Judge.

This is an appeal from a district court decision reported at 581 F.Supp. 423 (D.C. Ill. 1984) which grants a habeas corpus petition to three Illinois state criminal defendants. The petitioners are three brothers: Jimmie, Melvin and Robert Enoch. After a jury trial, they were convicted of rape and aggravated assault. The convictions were affirmed by the Illinois appellate court. See *People v. Enoch*, 104 Ill.App.3d 1203, 63 Ill.Dec. 295, 437 N.E.2d 944 (Ill.App., 1982). The Illinois Supreme Court denied leave to appeal. Petitioners subsequently filed their habeas corpus petition in the United States District Court for the Northern District of Illinois. Upon cross-motions for

* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

summary judgment, District Court Judge Prentice H. Marshall granted the habeas petition concluding that the trial court had violated petitioners' Sixth Amendment right by precluding the defense from calling a particular witness. The court concluded that despite the failure to adhere to discovery rules regarding disclosure of the witness, constitutional considerations compelled the trial court to permit the witness to testify. A review of this conclusion is the sole issue before this court. This court has jurisdiction of this appeal under 28 U.S.C. § 1291.

A complete recitation of the facts can be found at 581 F.Supp. 423. A brief review of the sequence of events during trial will provide the necessary perspective for our analysis.

The prosecution's main witness was the alleged victim, Sandra Davis. She testified she was returning from a visit to her cousin's house, Pamela Shaviers, at about 4:15 a.m. on the morning of December 6, 1979 when she encountered Robert and Melvin Enoch at 2031 South Clark Street. According to Davis, Robert and Melvin forced her into an elevator at the above address and took her to their apartment. At this point she alleges she was raped by the three petitioners. Davis claimed she left the Enoch residence at 7:20 a.m. and returned home. She reported the incident to police later in the day. She also visited a hospital later that day and the examining physician testified as to bruises and evidence of sexual intercourse.

The defense presented six witnesses. The first was a police investigator who spoke with Davis at the hospital and received a recital of the above facts.

Willie Enoch, petitioner's mother, next testified she was in the apartment during the night in question and let Jimmie and Melvin in at about 4 a.m. to 4:30 a.m. She did not specify if anyone else accompanied them. Mrs. Enoch testified she did not hear any noise or commotion in the apartment that night and fell asleep at approximately 5 a.m.

At this point in the trial the court recessed for lunch. There were still four defense witnesses and one rebuttal witness scheduled to testify. After lunch petitioner's attorneys notified the court that they had discovered an additional witness, a Patricia Griffin. Petitioners moved to amend their answer to the state's discovery request regarding the designation of witnesses. The prosecution objected. Defense counsel argued the new witness was a material witness and made the following offer of proof: That Patricia Griffin, whose apartment abutted the Enoch apartment, would testify she left her apartment at 7 a.m. on the morning of the alleged incident and that she saw Sandra Davis, a long-time acquaintance, on the way to a bus stop arguing with a man who shouted: "Bitch, where is the money?" Defense counsel also represented to the court that Ms. Griffin was in a bedroom abutting the Enoch bedroom at the time of the alleged assault and would testify as to what, if anything, was heard from the apartment during that time period.

Defense counsel denied any bad faith in the late discovery of Ms. Griffin and claimed they had not previously been informed of her testimony. The prosecution responded that Mrs. Enoch knew of Ms. Griffin's existence and that the sanction of exclusion should be applied. However, Ms. Griffin was available to be interviewed by the prosecution prior to her testifying. Furthermore, the prosecution did not specify any prejudice that would result from Griffin's testimony.

The trial judge denied petitioner's motion to amend the witness list. He stated that prejudice to the prosecution was not his only concern but also possible design in that the state had rested and the defense already commenced. As a result, petitioners were allowed only to call the four witnesses remaining on their next witness list. Charles Enoch testified he, Theresa Mosely, Michael Mayberry, Sandra Davis, Joyce Darnell, and Jimmie, Melvin and Peggy Enoch were together until 6 a.m. on the morning of December 6th. Charles stated that Davis, Robert Enoch and Mayberry left in close succession at about that time.

Theresa Moseley corroborated the testimony of Charles Enoch. She also stated she had known the alleged victim for five or six years and that "we use [sic] to disco together, and we use [sic] to have sex with mens [sic] for money." The final two defense witnesses, Joyce Darnell and Sherri Edwards, also corroborated Charles Enoch's testimony.

The prosecution's one rebuttal witness was Pamela Shaviers, Sandra Davis' cousin. Shaviers corroborated Davis' testimony by saying Davis visited her from 8 p.m. to 4:15 a.m. on December 6th and that she walked Davis to the bus and watched her leave.

This is a case where the State's interest in applying a discovery rule must be weighed against the defendants' Sixth Amendment right to a fair trial. In this situation the Seventh Circuit has adopted the following analysis:

> "[T]he right of a defendant to present relevant and competent evidence is not absolute and many 'bow to accommodate other legitimate interests in the criminal trial process,' . . . although the competing state interests must be substantial to overcome the claims of the defendant. Our task is thus to evaluate the exculpatory significance of the proffered evidence . . . and then to balance it against the competing state interest in the procedural rules that prevented the defendant from presenting this evidence at his trial." [Citations and footnotes omitted.] *McMorris v. Israel*, 643 F.2d 458, 461 (7th Cir. 1981). See also *Parisie v. Greer*, 671 F.2d 1011, 1018 (7th Cir. 1982).

Petitioners' proffered evidence was highly significant when considered in light of the other evidence in the case. The testimony at trial was conflicting with respect to the events of December 6th. The prosecution's only direct inculpatory evidence came from the alleged victim. Ms. Griffin's eyewitness account of the alleged victim's conduct during a portion of the time in question was clearly material testimony. If Ms. Griffin had heard a man shout at Ms. Davis the morning after the alleged incident,

"Bitch, where's the money?", this would suggest Ms. Davis was engaged in prostitution the night of the alleged incident. Such testimony is material to the issue of this case and the jury was entitled to consider it. We reject the State's contention that Ms. Griffin's testimony was cumulative. While Theresa Mosely stated that Davis was a prostitute, no evidence was presented as to whether Davis was engaged in prostitution on the evening in question.

The State also claims the Griffin testimony would only have presented an alternative basis for explaining Davis' bruises. Yet the narrower issue of the bruises is significant to petitioners' defense since it is crucial to the charge of assault. Finally, if Ms. Griffin were in an adjoining room at the Enoch apartment during the morning hours of December 6th and heard no noise, the jury could infer the following story from her testimony alone: that Davis was a prostitute, that she was working that night, that the Enochs (or others) failed to pay for her services and that this caused the physical confrontation with a pimp the following morning which resulted in bruises to Davis' body. Petitioners' inability to present this evidence to the jury was constitutional error.

The State's interest in applying discovery rules was not so substantial that it could override the Sixth Amendment considerations surrounding this case.

> "In balancing the competing interests . . . we must closely examine the justification for the state interest . . . The principal reason for notice rules, as we noted at the outset of this opinion, is prevention of surprise to the state, not punishment of the accused for mere technical errors or omissions." *Alicea v. Gagnon*, 675 F.2d 913, 924 (7th Cir. 1982).

In addition to preventing surprise, other factors considered before a witness preclusion sanction is employed to enforce discovery rules are: the effectiveness of less severe sanctions, the materiality of the testimony to the outcome of the case, prejudice to the other party caused

by the testimony, and the evidence of bad faith in the violation of the discovery rules. See *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983).

While there may have been some element of surprise involved in Ms. Griffin's late discovery she was available to be interviewed by the prosecution. Therefore, only a brief recess was necessary. The prosecution never specified what prejudice would result from her testimony. Furthermore, there was no evidence of bad faith. The trial court's speculation that some "design" could be present is also unsubstantiated and without any evidentiary basis. Less severe sanctions were available but apparently were not considered by the trial judge. Considering the exculpatory significance of the Griffin testimony it should have been admitted.

The State argues Ms. Griffin should not testify because defendants' mother knew of her existence and that such negligent behavior should not be used as a vehicle to avoid discovery notice rules. However, there is no basis in the record for imputing Mrs. Enoch's knowledge to her sons.[1] Absent bad faith on the part of petitioners, Mrs. Enoch's negligence should not preclude the Enoch brothers from fully telling their side of the story.

The State believes we should employ the standard utilized in *United States v. Rogers*, 475 F.2d 821 (7th Cir. 1973), which was later used in *United States ex rel. Chatman v. Lane*, 573 F.Supp. 693 (N.D. Ill. 1983). Under the *Rogers* test a defendant's Sixth Amendment rights are considered violated when his "inability to make the [witness] inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness's direct testimony." See *Rogers*, 475 F.2d at 827. For

---

[1] Indeed, the State admits this on page 18 of its brief:

> ". . . the District Court first noted that it appears not to have been petitioners' fault that Griffin was not discovered as a witness until late into the trial. Respondent does not dispute this conclusion . . .

the reasons stated above, we believe petitioners have met the *Rogers* standard in that they were prejudiced by Ms. Griffin's inability to testify. Further, the *Rogers* case is distinguishable from the case *sub judice*. In *Rogers* the issue was a defendant's right to cross-examine [confront] a witness. In our case the issue is a defendant's right to present a witness in his defense. In this situation the *McMorris* guidelines are appropriate.

Chatman is also distinguishable. The witness who was not allowed to appear in *Chatman* was being used only to impeach another witness's identification skills and was not of the same significance as Ms. Griffin in our case. Indeed, the *Chatman* court applied the harmless error rule in deciding there was no error at the state level. We have already concluded the harmless error cannot be applied in our case. This is because we believe there is a reasonable possibility the exclusion of the Griffin testimony affected the jury's verdict and we cannot conclude the error was harmless beyond a reasonable doubt. See *Allison v. Gray*, 603 F.2d 633, 634 (7th Cir. 1979). Since we do not find the error here harmless, a final case advanced by the State, *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981), does not enhance the State's position. The primary holding in *Davis* is that the Sixth Amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules against criminal defendants. *Id.* at 243. First, this holding supports the district court holding in the case *sub judice*. Secondly, while *Davis* does hold the harmless error rule can nullify this principle, we have found no harmless error and therefore *Davis* is not helpful here.

For the reasons set forth above, the decision of the district court is affirmed.

APPENDIX B

UNITED STATES of America ex rel.
Jimmie ENOCH, Melvin Enoch, and
Robert Enoch, Petitioners,

v.

Michael LANE, Director of Department
of Corrections, State of Illinois,
Respondent.

No. 83 C 4303.

United States District Court,
N.D. Illinois, E.D.

Feb. 23, 1984.

MEMORANDUM OPINION

PRENTICE H. MARSHALL, District Judge.

In this habeas corpus case we address an issue of apparent first impression in this circuit: whether it is constitutionally permissible in a state criminal prosecution for the trial judge to refuse to permit a material defense witness to testify because the witness was not listed on the defense's pretrial witness list submitted in response to the prosecution's discovery request.

Petitioners Jimmie, Melvin, and Robert Enoch were found guilty of rape and aggravated kidnapping by a jury in the Circuit Court of Cook County, Illinois in June 1980. Jimmie and Robert were sentenced to two concurrent 25 year terms, and Melvin was sentenced to two concurrent 12 year terms. The convictions were affirmed on appeal. *People v. Enoch*, Nos. 81-2100, 81-2101, & 81-2102 (Ill.App. Mar. 31, 1982). The Illinois Supreme Court denied leave to appeal.

The main prosecution witness was the victim of the alleged crime, Sandra Davis. She testified that she went to visit her cousin, Pamela Shaviers, at 10744 South Wentworth in Chicago on the evening of December 5, 1979. She left her cousin at 4:15 a.m. on December 6 and rode a bus toward her home at 2030 South State Street. Davis testified that as she walked past 2031 South Clark Street, she saw Melvin and Robert Enoch. Robert stopped her and told her that he was "going to take [her] body." Davis pulled away, but Robert grabbed her and pushed her toward the elevator at 2031 South Clark. She testified that she saw a gun in Robert's belt. Robert put his hand on the gun and told Davis that they were going to take her upstairs and rape her. The three entered the elevator and exited on the 14th floor.

Melvin opened the door to apartment 1403 with a key, and Robert told Davis to keep quiet because his mother was asleep in the apartment. Davis was taken to a back bedroom containing two beds. Robert struck her on the side of the head with his gun and then forced her to have intercourse with him. Robert then left; Melvin entered, struck her, and forced her to have intercourse with him. Petitioner Jimmie Enoch entered as Melvin left and also forced Davis to have intercourse. Then Robert returned and again forced Davis to have intercourse with him. He told Davis that if she mentioned the incident to anyone she would be killed. Davis also testified that Melvin took photographs of the incident and threatened to "show them all around the building" if she told on them. Another Enoch, Douglas, apparently remained through the entire incident on the other bed in the room. Though Davis testified that Douglas was lying down, she was unsure whether he was awake or asleep.

Davis testified that she left the Enoch residence at approximately 7:20 a.m. and went home. Later that day, she reported the rape to her mother, who called the police. Davis was taken to Mercy Hospital, where she was examined. The examining physician testified at trial that Davis had been beaten and that her vagina contained a

large quantity of semen. Both the physician and Davis' mother testified without objection that Davis told them she had been raped.

The first defense witness was a police investigator. The defense elicited from the investigator that he spoke with Davis at the hospital and that Davis told him that she had been raped by three men in apartment 1403 at 2031 South Clark and that she saw "a mother and a sister asleep" in the apartment. It is unclear why the defense introduced this testimony.

Petitioners' mother, Willie Enoch, testified that Melvin and Jimmie left the family's apartment (the same apartment 1403 referred to by Davis) between 8:00 and 9:00 p.m. on December 5. Her daughter and another woman, Joyce Darnell, left shortly thereafter, leaving Mrs. Enoch and her son Douglas, and a baby. Mrs. Enoch watched television in her bedroom "all night . . . until the all night show came on." She let Jimmie and Melvin into the apartment around 4:00 or 4:30 a.m. on December 6. The prosecution, which elicited the latter testimony, did not ask Mrs. Enoch whether anyone was with her sons when they entered. Mrs. Enoch testified that she did not hear any commotion or noises in the apartment, though she stated that she probably was asleep by 5:00 a.m.

After Mrs. Enoch testified, and after a luncheon recess, petitioners' lawyers moved to amend their answer to the state's discovery request. One of the lawyers stated that he had learned some additional information from the Enoch family concerning an additional witness. He identified the witness as Patricia Griffin and stated that she would testify concerning an altercation she had observed between Ms. Davis and a man on the morning of the alleged rape. The prosecution objected to the belated disclosure. The court deferred consideration of this question until petitioners' lawyers could obtain more detailed information concerning the proposed witness' testimony.

After another recess, petitioners' lawyer identified the witness as Patricia Griffin, a resident of apartment 1402

at 2031 South Clark. Petitioners' lawyer made the following offer of proof, based on statements made to him by Griffin. On December 6, Griffin left her apartment at 7:00 a.m. On her way to the bus stop, she saw Sandra Davis, whom she had known since she was a young girl. Davis was arguing with a man, who was stating loudly something to the effect of "bitch, where is the money."[1]

Petitioners' attorney stated that he had become aware of Griffin only that day. Griffin had spoken with Mrs. Enoch some time ago, but Mrs. Enoch had not informed her sons' lawyer despite being in contact with him. The lawyer stated that Ms. Griffin was available if the prosecution wished to speak with her. The prosecutor responded that in light of Mrs. Enoch's knowledge of Griffin and the fact that Griffin lived next door to the Enochs,[2] the defense should not be permitted to add her to its witness list. The prosecution did not identify any prejudice to it as a result of the late disclosure. Essentially, its argument was based solely on the defense's lack of diligence.

The trial judge stated that discovery rules were, after all, rules, and noted that they were in the middle of a jury trial. He stated that it was "more than a question of prejudice . . . It is a question of possible design, possibly I say, after the state has rested and the defense has commenced." He therefore denied the motion to amend the witness list, effectively precluding the defense from calling Ms. Griffin.

The defense's next witness was Charles Enoch, also a resident of 2031 South Clark, apartment 1403. He stated that around 7:00 p.m. on December 5, he rode the building elevator with Robert. When the elevator stopped on the

---

[1] The defense attorney later noted that at or about the time of the assault, Ms. Griffin was in a bedroom adjoining the bedroom where the alleged rape took place.

[2] The prosecutor also noted that the Enochs had been demanding for two months to go to trial.

18th floor, he saw Teresa Mosley, Sandra Davis, and Michael Mayberry standing in the elevator room. He identified Davis as a resident of 2030 South State Street. Later that evening, Charles and Robert went to apartment 1906 at 2031 South Clark. Present were Sharon Edwards, who lived in apartment 1906, Teresa Mosley, Michael Mayberry, and Sandra Davis. They smoked some marijuana, took some pills (which were not identified at trial), and drank some cough syrup. Mosley left around 3:00 a.m. on December 6. Those remaining were later joined by Jimmie, Melvin, and Peggy Enoch and Joyce Darnell. Sandra Davis, Robert Enoch, and Michael Mayberry left the apartment around 6:00 a.m. They did not leave together but rather left in close succession. The prosecutor impeached Charles' testimony by eliciting on cross examination that Charles had never reported his version of the events of December 5 and 6 to the police. He also suggested that Charles had concocted the story with his brothers, Joyce Darnell, Teresa Mosley and Michael Mayberry.

Teresa Mosley, also a resident of 2031 South Clark, was the next defense witness. She testified that she had known Sandra Davis for five or six years. She stated that "[w]e use [sic] to disco together, and we use [sic] to have sex with mens [sic] for money." Mosley testified to a series of events similar to that testified to by Charles Enoch. On cross examination, Mosley first denied visiting any of the defendants in jail but later admitted going to the jail to visit Robert Enoch approximately three weeks before the trial. She denied, however, actually seeing Robert at the jail. The prosecution also impeached Mosley by eliciting that she had never reported her version of the events to the police despite knowing that the Enochs were in jail awaiting trial for rape.[3]

---

[3] Mosely also testified that some six weeks before trial Joyce Darnell, who was then married to Jimmie Enoch, was involved in an altercation with Sandra Davis at the Criminal Courts building. She stated on cross examination that Davis started the fight.

Joyce Darnell was the next defense witness. She married Jimmie Enoch sometime after December 6, 1979. Darnell corroborated the previous defense witnesses' version of the events of December 5 and 6. On cross examination the prosecution attempted to impeach her in the same manner as it had the other defense witnesses. Sherri Edwards, the final defense witness, also confirmed the defense version of the events. After Edwards testified, one of the defense lawyers noted for the record that Patricia Griffin was present in court and asked if he could make a formal offer of proof. The judge declined to permit this, stating that he had already ruled on that matter.

The prosecution called one rebuttal witness, Davis' cousin Pam Shaviers. Shaviers testified that Sandra Davis came to her house alone around 8:00 p.m. on December 5 and remained until 4:15 a.m. on December 6. Shaviers walked Davis to the bus stop and watched her board a bus.

The defense's theory appears to have been twofold: first, that the Enochs did not have intercourse with Davis, that the evidence revealed in the hospital examination was due to her alleged "profession," and that any physical abuse was done by someone else. Alternatively, if the Enochs had intercourse with Davis, it was not done by force or against Davis' will. The prosecution argued that Davis was a credible witness and that the defense testimony was fabricated.

Respondent has completely misapprehended the nature of this case.[4] It characterizes the petition as a challenge to an "evidentiary ruling" and argues that the evidence

---

[4] Respondent filed a motion for summary judgment with a supporting memorandum. Petitioners filed a responsive memorandum combined with a cross motion for summary judgment. Respondent's next filing was a one page document stating that respondent stood on his earlier memorandum. Petitioner's counsel orally waived the filing of a further brief in a telephone conversation with our law clerk Matthew Kennelly.

was "cumulative, and speculative at best." Though we construe the latter argument as a claim of harmless error, respondent has not addressed the constitutional issue raised by the petition. Further, its argument on the merits in its memorandum takes up all of one page. This, despite the fact that the habeas petition clearly characterized the claim as one of denial of petitioners' fourteenth amendment right to present a defense at trial and cited two important Supreme Court cases on that issue, *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), and *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers*, 410 U.S. at 302, 93 S.Ct. at 1049. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defendant against the State's accusations. The right[ ] . . . to call witnesses in one's own behalf [has] long been recognized as essential to due process." *Id.* at 294, 93 S.Ct. at 1045. In the present case the state trial court precluded the defense from calling a witness as a discovery sanction. In the circumstances of this case, the trial court's action violated petitioners' constitutional right to present a defense.

The colloquy that took place when the defense moved to amend its witness list demonstrates that the trial court acted with the aim of sanctioning the defense's noncompliance with discovery. The defense lawyer, after describing Griffin's expected testimony, stated that he had learned of the witness from petitioners' mother, who had told him about Ms. Griffin only that day. R. 228. He also stated that Griffin was available if the prosecution wished to interview her. *Id.* The prosecution's argument that the motion to amend should be denied was based solely on the fact that the witness was known to Mrs. Enoch prior to trial, that she was the Enochs' next door neighbor, and that defendants had been demanding to go to trial for two months. R. 229. The trial judge then stated:

> [I]f there are to be discovery rules, they are to be viewed as rules, and whereas this Court interprets them liberally, as is suggested, they still are rules. . . . Here are defendants who had demanded trial before this Court, which they had every right to do, and which the Court encourages, especially when people are in custody, and because they did we held their case on the trial call every day for over two months, for about ten weeks. . . . We are in the third day of trial, including the jury selection, and it is now revealed to the Court that a woman in the apartment next to the apartment of the defendants spoke allegedly to the mother months ago. . . .
>
> * * * * * *
>
> [N]ow it is suddenly revealed on the third day of the trial, when the State has rested and the defense has commenced. It would violate every contention of any notice of discovery to permit it.

R. 230-31. The defense then argued that the State had not shown any prejudice due to the late disclosure. R. 231. The court responded: "It is more than a question of prejudice. It is more than a question of how one side or the other is going to be hurt. It is a question of possible design, possibly I say, after the State has rested and the defense has commenced." *Id.* The court went on to state that

> situations like this are froth [sic] with possibilities. I imagine that this very situation is one of the strongest reasons why discovery rules were eventually adopted whereas it was not too long ago there were no discovery ruled beyond a list of witnesses.
>
> These rules have been adopted, and they are good rules, and they should be adhered to and interpreted liberally. If it were the day before trial or the day of the trial, the morning of the trial, it would be late, but it would be a different factual situation, but these things are hardly tolerable.

R. 232.

An examination of the trial judge's statements indicates three possible reasons for the denial of the motion to amend the witness list. First and foremost, the judge was of the view that "rules are rules." Second, he speculated that nondisclosure was "a question of possible design." Finally, he noted twice that the disclosure came during the trial, which suggests that he was concerned with delaying or interrupting the trial.

Even if the court's suggestion that the late disclosure was purposeful was a finding of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d) (1976) and *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), several exceptions to the presumption apply here. First, the material facts underlying the finding were not adequately developed by the trial court. 28 U.S.C. § 2254(d)(3). Second, petitioners did not receive a "full, fair, and adequate hearing" on the issue of purposefulness, *id.* § 2254(d)(6). Finally, and most important, the finding is "not fairly supported by the record," *id.* §2254(d)(8). The only evidence in the record concerning the reason for the late disclosure is that petitioners' mother, the only person identified as knowing of Griffin's potential testimony, did not tell petitioners' lawyers about Ms. Griffin until trial had started. There was no basis for attributing to petitioners any willful intent, for there is nothing indicating that they were aware that Ms. Griffin knew of facts favorable to them.

Though as a trial judge we sympathize with the state court judge's concern with delaying the trial of a case that has already begun, there is nothing in the record that shows that a continuance would have been necessary here. The state was represented by two lawyers throughout the trial; one of those lawyers could have interviewed Ms. Griffin while the testimony continued. The defense presented four additional witnesses after the colloquy concerning Griffin. Moreover, the trial did not end that same day; had the court inquired of petitioners' lawyer as to the amount of defense testimony he expected to present, it may well have been able to determine that trial would

continue through the following day, which would have provided the prosecution with even more time to interview Griffin.[5] Finally, as we have noted, the prosecution did not argue that it would be prejudiced by the belated adding of Griffin to the defense list of witnesses. Any conclusion that delay would have resulted had the trial court granted the defense motion is not supported by the record.[6]

This leaves us with the "rules are rules" rationale as the only basis supported by the record for the trial court's action. We do not think that this reason is a constitutionally adequate one for precluding a criminal defendant from offering relevant and material testimony.

The Supreme Court has expressly left open the question whether it is proper under the sixth amendment (as incorporated by the fourteenth amendment) to enforce discovery rules against a noncomplying criminal defendant by excluding relevant and probative evidence. In *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) and *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973), the Court held that state rules requiring a defendant to give prior notice of his intention to rely upon an alibi defense and of his alibi witnesses comport with due process only if the defendant receives reciprocal discovery rights. In *Williams*, however, the defendant complied with the notice of alibi rule, and in *Wardius*, the Court held that the absence of reciprocal dis-

---

[5] The fact that this might not have provided the prosecution with time to develop rebuttal to Griffin's expected testimony does not in the circumstances of this case make much of a difference. It appears that none of petitioners' witnesses who testified as to the events of December 5 and 6 spoke with the prosecution or the police. The prosecution was nonetheless able to impeach their testimony effectively, as indicated by the fact that the jury rejected the defense theory and accepted Davis' testimony.

[6] Further, we again note that respondent does not contend that the trial court's action is justified by reason of any delay that would have been occasioned by granting petitioners' motion or by reason of any intentional nondisclosure by petitioners or their lawyers.

covery made enforcement of the rule invalid, so the Court was not required to reach the question whether a reciprocal discovery statute could constitutionally be enforced against a defendant. *Williams*, 399 U.S. at 83 n. 14, 90 S.Ct. at 1897 n. 14; *Wardius*, 412 U.S. at 472 n. 4, 93 S.Ct. at 2211 n. 4.

Nor has the Seventh Circuit addressed the question presented in this case or the analogous issue in the notice of alibi context. In *Alicea v. Gagnon*, 675 F.2d 913 (7th Cir.1982), the court held that it was unconstitutional to prevent a defendant from testifying on his own behalf as a sanction for noncompliance with a state notice of alibi rule. It expressly left open the question whether the same rule would apply to witnesses other than the defendant, noting that that very issue was presented in another case then pending before the court. *Id.* at 917 n. 6. However, when the other case, *United States ex rel. Veal v. DeRobertis*, 693 F.2d 642 (7th Cir.1982), was decided, the basis for the decision was somewhat different than anticipated. The court held that the alibi notice rule applied to the petitioner was of the non-reciprocal sort forbidden by *Wardius*. *Id.* at 647. Moreover, it remanded the case to the trial court, because there was doubt as to whether petitioner has preserved the sixth amendment issue in the state courts. Thus, the Seventh Circuit has not spoken on the issue presented here. Further, we have found no decisions by other judges in this district that are on point.

Several courts have held that discovery rules like or akin to that involved here cannot be enforced against a noncomplying defendant by precluding testimony. The most recent of these cases is *Fendler v. Goldsmith*, 717 F.2d 1552 (9th Cir.1983). In *Fendler*, the trial court refused to permit the petitioner to call two defense witnesses because he had not listed their addresses on his pretrial witness list, as required by state discovery rules. The court noted that it was unclear whether the sixth amendment strictly prohibited witness preclusion as a discovery sanction or rather required an examination of all the attendant circumstances. *Id.* at 1555-57. However, ap-

plying the balancing test, the court held that the trial court had committed constitutional error. One of the witnesses was petitioner's key witness on a significant issue in the case. Further, the prosecution would not have been prejudiced or surprised by the witness' testimony since it already had his name and lacked only his address and since a brief continuance would have accommodated any need for time to prepare for cross examination or rebuttal. *Id.* at 1558-59. Even assuming that petitioner's noncompliance was willful, the court stated, the preclusion of the witness was "too high a price to exact for failure to comply with discovery orders issued pursuant to general discovery rules." *Id.* at 1560.

In *United States v. Davis*, 639 F.2d 239 (5th Cir.1981), the Fifth Circuit held that it was improper to exclude otherwise admissible evidence solely as a discovery sanction.[7] In *Davis*, a case involving an alleged conspirary to possess and distribute marijuana, the prosecution relied heavily on the testimony of a confidential informant who was involved in the alleged conspiracy. The trial court refused to permit the defendants to impeach the informant's credibility by means of reputation testimony by two other witnesses, since the witnesses were not on defendants' pretrial witness list.[8] The court of appeals reversed, stating that while witness preclusion might be a proper sanction where justified by overriding policy considerations, preclusion solely as a discovery sanction was improper. *Id.* at 243.

The court in *Hackett v. Mulcahy*, 493 F.Supp. 1329 (D.N.J.1980) held that it was unconstitutional to preclude the testimony of a defense witness because of counsel's failure to comply with discovery rules, unless the record

---

[7] *Davis* was a federal prosecution. The discovery rules in question were Fed.R.Crim.P. 16 and a pretrial discovery order entered by the trial court.

[8] The trial court alternatively ruled that the testimony would be merely cumulative. The court of appeals disagreed with this conclusion as well, 639 F.2d at 243-45.

revealed some complicity by the defendant. *Id.* at 1336. Finally, in *Ronson v. Commissioner of Correction*, 604 F.2d 176 (2d Cir.1979), the court examined a state court's refusal to permit a defendant to call a psychiatrist to testify in support of an insanity defense, because the defendant had not given notice of his intention to raise that defense, as required by state law. *Ronson* differs from the present case in that the defendant had substantially complied with the notice requirement by sending a letter to the prosecution "reserving [his] right" to interpose such a defense. However, the case is significant in that the court applied a "less restrictive alternative" analysis, noting that a continuance would have minimized any possible surprise or prejudice to the prosecution. *See also Fendler*, 717 F.2d at 1557 (noting that alternate means exist to make discovery rules effective, including continuances, permitting prosecutorial comment on the defendant's noncompliance, and contempt); Note, "The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense," 81 Yale L.J. 1342, 1356-60, 1364 (1972); Reznick, "The New Federal Rules of Criminal Procedure," 54 Geo.L.J. 1276, 1294 (1966).

The Supreme Court's opinion in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), informs our analysis here:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system depends on full disclosure of all the facts, within the framework of the rules of evidence.

Id. at 709, 94 S.Ct. at 3108. Except in a case where preclusion is imposed for reasons related to the integrity or probative value of the evidence, it necessarily detracts from the "search for the truth," which is, as the Supreme

Court has stated, a central goal of the criminal justice system. *United States v. Nobles*, 422 U.S. 225, 232, 95 S.Ct. 2160, 2167, 45 L.Ed.2d 141 (1975); *Williams v. Florida*, 399 U.S. 78, 82, 90 S.Ct. 1893, 1896, 26 L.Ed.2d 446 (1970). In the present case there is no suggestion that the trial court acted out of a perceived need to bar evidence with no probative value or that was somehow tainted.[9]

Thus, this case is not like *United States v. Nobles*. In that case, the Court upheld a trial court's ruling barring an investigator from testifying for the defense concerning a government witness' prior statements if the defense did not produce the investigator's written report for use by the government in cross examination. The Court specifically noted that the district court "did not bar the investigator's testimony" but rather "merely prevented [defendant] from presenting to the jury a partial view of the credibility issue . . . ." *Id.* 422 U.S. at 241, 95 S.Ct. at 2171. The Court stated that the sixth amendment "does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as justification for presenting what might have been a half-truth." *Id.* In the present case, there is no basis for concluding that Griffin's testimony would have been a "half-truth" in the sense of *Nobles*; though one might argue that Griffin's potential testimony was, as the prosecution argued with respect to the other defense witnesses, "concocted," the trial court could not make such a determination on the basis of the record before it. *Nobles* may permit a trial court to bar testimony where the defense obstructs any meaningful cross examination; it does not permit a trial

---

[9] Though the prosecution undoubtedly would have argued that Griffin's testimony was "concocted" had it been admitted, as it argued with respect to the other defense witnesses, the state court made no such determination in denying the motion to amend the witness list, nor was there any basis for it to make such a determination.

court to bar testimony absent a showing of such prejudice to the state.

Nor is this case like those where the integrity of the evidence is questionable. Courts have held that where a defense witness has violated a sequestration order, her testimony may be precluded if it was tainted by the lack of sequestration. *See Holder v. United States*, 150 U.S. 91, 14 S.Ct. 10, 37 L.Ed. 1010 (1893); *Fendler*, 717 F.2d at 1556.

Like the court in *Fendler*, we see no need in the present case to decide whether the sixth amendment requires a prohibition of witness preclusion as a discovery sanction, for even under a balancing test we think that the trial court committed constitutional error. While we recognize that there is a body of opinion supporting the view that witness preclusion may sometimes be the only way to enforce valid discovery rules, *see Fendler*, 717 F.2d at 1557 (citing several state court cases), in the circumstances of this case the sanction was too stiff a penalty. First, there is no evidence that petitioners were in any way responsible for the failure to list Griffin as a witness. The failure appears to be attributable to petitioners' mother or, perhaps, to the lack of diligence of petitioners' lawyer. As the court noted in *Fendler*, penalizing a criminal defendant for his lawyer's negligence only creates additional constitutional problems and invites attacks on convictions based on the incompetence of counsel.

Second, Griffin's testimony was very important to the defense. The evidence against petitioners consisted primarily of the testimony of the victim, Sandra Davis. Her story was credited by her mother and the examining physician, both of whom stated that Davis had told them that she had been raped. The prosecution's case, then, depended almost entirely on the credibility of Davis when she claimed that petitioners had raped her and inflicted the blows that caused her to be bruised. Petitioners' defense was, as we have noted, two-fold; the first line of defense was that Davis' condition resulted from her alleged "profession" as a prostitute, and that no rape oc-

curred. Griffin's testimony would have buttressed petitioners' contention that Davis was a prostitute by providing evidence corroborating Teresa Mosley's testimony. We disagree with the state appellate court's conclusion, *see People v. Enoch*, slip op. at 3-4, that Griffin's testimony would have been cumulative in this respect.[10] The prosecution noted in its closing argument, R. 380, that Mosley appeared to have been under the influence of drugs when she testified, and thus Griffin possibly could have provided more credible evidence as to Davis' alleged activities. Though Griffin would not have testified directly as to Davis' activities, her testimony concerning the altercation on the sidewalk would have lent support to Mosley's testimony.

Moreover, Griffin's testimony concerning the altercation might have also provided an alternative basis for explaining how Davis had become bruised. Since Griffin was not, unlike many of the defense witnesses, related to petitioners, her testimony would have been less subject to question on the basis of bias. Without Griffin, the defense was limited to arguing that some unknown person might have committed the assault. With Griffin, that theory would have been less speculative. Griffin's testimony would have provided a more solidly placed anchor for the defense's theory of the case. It was therefore important testimony.

Further, as we have noted, there is no evidence that petitioners willfully withheld Griffin's name from the court or the prosecution. There was no suggestion of prejudice by the prosecution, and nothing indicating that any great delay would have been occasioned had Griffin been permitted to testify. *See* p. 428 *supra*. Though the prosecution was surprised by the mention of Griffin, surprise in itself means nothing; surprise becomes meaningful only where it causes prejudice. There was no showing of prejudice here. Thus, even applying a balancing test, the trial

---

[10] This conclusion is not a finding on an unmixed question of fact such that the *Sumner v. Mata* presumption of correctness applies.

court based its ruling on a showing by the state that was inadequate to overcome the presumption against exclusion of otherwise probative and admissible defense evidence. *See Washington v. Texas*, 388 U.S. at 19, 87 S.Ct. at 1923; *Fendler*, 717 F.2d at 1558. We hold that the state court committed constitutional error in precluding Griffin's testimony.[11]

We must next decide whether the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Alicea v. Gagnon*, 675 F.2d at 925. The test is " 'whether there is a reasonable possibility' that the error affected the jury's verdict. In answering this question, the court must assess the 'probable impact of the [error] on the minds of an average jury.' " *Allison v. Gray*, 603 F.2d 633, 634 (7th Cir.1979) (quoting *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828, and *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284 (1969)). Based on the non-cumulative nature of the evidence and the fact that it would have provided a more solid basis for the defense theory of the case, *see* p. 431 *supra*, we cannot conclude beyond a reasonable doubt that the state trial court's error was harmless.

Respondent has not requested an evidentiary hearing, and we do not find one necessary.[12] All the evidence needed

---

[11] There are several cases upholding the preclusion of defense witnesses or other evidence under the federal notice of alibi rule, Fed.R.Crim.P. 12.1, as a sanction for noncompliance. *See, e.g., United States v. White*, 583 F.2d 899 (6th Cir. 1978); *United States v. Fitts*, 576 F.2d 837 (10th Cir. 1978); *United States v. Barron*, 575 F.2d 752 (9th Cir. 1978); and *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977) (preclusion of government witness), *cert. denied*, 439 U.S. 847, 99 S.Ct. 147, 58 L.Ed.2d 149 (1978). *Myers* involved a government witness, and in none of the other three cases was the question presented in constitutional terms. *See White*, 583 F.2d at 901 n. 3; *Fitts*, 576 F.2d at 837, 839 (sixth amendment question presented, but in context of claim of ineffective assistance of counsel); *Barron*, 575 F.2d at 757 n. 5.

[12] No argument is made that petitioners failed to preserve their constitutional claim at trial or on direct appeal.

to rule on the due process and harmless error issues is contained in the trial record. Petitioners' motion for summary judgment is granted, and respondent's motion for summary judgment is denied. The petition for a writ of habeas corpus is granted. The writ will issue unless petitioners, Jimmie Enoch, Melvin Enoch and Robert Enoch, are retried within 120 days hereof. Judgment to enter accordingly.

APPENDIX C

Nos. 80-2100, 80-2101, 80-2102

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
THIRD DIVISION—FILED MARCH 31, 1982

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

JIMMIE ENOCH, MELVIN ENOCH, and ROBERT ENOCH,

Defendants-Appellants.

Appeal from the Circuit Court of Cook County.
Honorable **Thomas J. Maloney**, Presiding.

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

After a jury found defendants Jimmie, Robert and Melvin Enoch guilty of rape and aggravated kidnapping, the court sentenced Jimmie and Robert Enoch to concurrent terms of 25 years and Melvin Enoch to concurrent terms of 12 years. On appeal defendants contend that the trial court improperly excluded testimony of a defense witness, permitted the State to introduce admissions of a defendant which had not been previously revealed to defendants, and admitted prejudicial hearsay statements.

Defendants also maintain that they were denied a fair trial due to improper prosecutorial comments and a supplemental jury instruction given by the trial court.

Complainant testified that shortly after 4:15 a.m. on December 6, 1979, she was returning home from her cousin's home when she was accosted by Robert Enoch. He was armed with a gun and grabbed her by the arm and neck. He led her into an elevator and up to an apartment. She was cautioned to be quiet because defendants' mother was asleep. She was taken to a back bedroom where Robert and Melvin each beat and raped her. Jimmie then raped her. Robert warned complainant that if she told her mother or the police they would kill her. She was permitted to leave the apartment at approximately 7:25 a.m.

When complainant arrived home, "swollen and hysterical," she told her mother she did not feel like talking and she went to bed. When she arose at noon, she told her mother that she had been raped by the Enoch brothers. The police were called, and she was examined by a doctor. The doctor testified that her face and neck were bruised and that the right side of her face and neck were bruised and that the right side of her face and eye were extremely swollen. She was crying and shaking. There was a large amount of seminal fluid in her vagina. The complainant told the doctor she had been raped by three men.

Charles and Joyce Enoch, Teresa Mosley and Sherri Edwards testified for defendants that at the time of the alleged offense complainant was with them at a drug party in Edwards's apartment. Mosley also stated that she and complainant had worked together as prostitutes.

Pam Shaviers, complainant's cousin, testified in rebuttal that complainant was at the Shavier home until 4:15 a.m. on December 6.

Defendants initially contend that they were denied the right to present a defense because the trial court refused to allow them to amend their answer to discovery to add Patricia Griffin as a witness. Defendants' motion to add

Griffin as a witness was made after the State had rested and three defense witnesses had been called. The testimony was excluded because defendant had failed to comply with discovery provisions requiring prior disclosure of information regarding all potential defense witnesses. (Ill. Rev. Stat. 1979, ch. 110A, par. 413(d)(i).) Although exclusion is a drastic sanction, *People v. Rayford* (1976), 43 Ill. App.3d 283, 356 N.E.2d 1274, it is within the discretion of the trial court whose discretion will only be disturbed upon a showing of prejudice. (*People v. Aguero* (1980), 87 Ill. App.3d 358, 408 N.E.2d 1092.) We find no prejudice in the present case.

According to defendants, Griffin would have testified that she was in the apartment next to defendants' at the time of the occurrence and that she heard no noise. Since complainant stated that she had been warned to keep quiet, we do not believe that the exclusion of this testimony prejudiced defendants. Griffin was also to have testified that she observed complainant that morning, arguing with a man who said to her, "bitch, where is the money?" Defendants' claim that this testimony would have inferred that complainant was a prostitute is not only speculative but also cumulative in light of Mosley's testimony. Its exclusion caused defendants no prejudice.

Defendants next contend that the trial court erred in permitting the State to introduce a previously undisclosed statement of Jimmie Enoch. The statement recited that he knew complainant and that she had been in his family's apartment at some unspecified date in December 1979; that his brothers were also present; and that he had gotten so high smoking marijuana that he did not remember what happened but he was sure that neither he nor his brothers had sex with complainant.

Although defendants were entitled to the substance of this oral statement, Ill. Rev. Stat. 1979, ch. 110A, par. 412(a)(i), noncompliance with discovery rules does not require reversal absent a showing of prejudice to the defendant. (*People v. Greer* (1980), 79 Ill.2d 103, 402 N.E.2d

203.) The trial court may have believed the prosecutor's assurance that he orally advised defense counsel of the substance of the statement. This coupled with the court's granting defendants an extra day to investigate should have alleviated any prejudice. *People v. Herrera* (1981), 96 Ill. App.3d 851, 422 N.E.2d 95.) Furthermore, the admission that defendants were drug users and were acquainted with complainant was not inconsistent with the testimony of defendants' own witnesses. The introduction into evidence of Jimmie Enoch's statement does not require reversal.

Defendants also contend that complainant's statements to her mother and examining physician were inadmissible hearsay. Rape complaints made to both witnesses were admissible under the corroborative complaint exception to the hearsay rule. (*People v. Damen* (1963), 28 Ill.2d 464, 193 N.E.2d 25.) Although details are inadmissible under this exception, their admission in the present case did not constitute reversible error since no facts were revealed which were not also established by the complainant's own testimony and other corroborative evidence and since defense counsel had the opportunity to cross-examine the out-of-court declarant. *People v. Robinson* (1978), 73 Ill.2d 192, 383 N.E.2d 164.

Defendants next argue that improper remarks made by the prosecutor during closing argument were so prejudicial that they deprived defendants of a fair trial. Defendants first complain that the prosecutor characterized them as garbage, punks and criminals, and compared them to the James and Dalton gangs. Although these comments were needlessly harsh, we find that under the facts and circumstances of this case, they were not so prejudicial as to constitute a material factor in defendants' convictions or deny them a fair trial. *People v. Martinez* (1977), 45 Ill. App.3d 939, 360 N.E.3d 495.

Defendants also claim that they were prejudiced by the prosecutor's comments on the State's burden of proof. He stated that "every convicted criminal who sits in the

penitentiary in this country has been proved guilty beyond a reasonable doubt" and that the standard has been the same "for the past two hundred years." This court has found an almost identical statement to be a superfluous but harmless restatement of the State's burden of proof. (*People v. Smith* (1981), 93 Ill. App.3d 1133, 418 N.E.2d 172.) While the prosecutor's additional assertion that there was nothing "magical" or "unusual" about the standard, coupled with his reference to it as a "defense tactic" and "smoke-screen" was improper, in view of the overwhelming evidence against defendants we do not believe the statement contributed to their convictions.

Defendants did not object to the prosecutor's comment about the law of accountability. Hence they have waived the issue on review. *People v. Skorusa* (1973), 55 Ill.2d 577, 304 N.E.2d 630.

Defendants finally contend that they were denied a fair trial because the trial court gave supplemental instructions to the jury on the issue of accountability which were unclear and overemphasized the issue. When the jury informed the court that it was confused with regard to certain jury instructions the court had an obligation to try and clarify the question in the mind of the jury. (*People v. Land* (1975), 34 Ill. App.3d 548, 340 N.E.2d 44.) The court in this case adequately performed this task.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Dated at Chicago, Illinois, this 31st day of March, 1982.

ENTER:

/s/ William S. White
Justice

/s/ Daniel J. McNamara
Justice

/s/ Dom J. Rizzi
Justice